FILED

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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KEITH IBECHUI WASISANG,

Appellant,

v.

REPUBLIC OF PALAU,

Appellee. :

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CRIMINAL APPEAL NO. 11-001
(Criminal Action No. 09-208)

OPINION

Decided: May 8th, 2012

Counsel for Appellant: Yukiwo P. Dengokl
Counsel for Appellee: Jason L. Loughman, Office of the Attorney General

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ALEXANDRA F. FOSTER, Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Keith Ibechui Wasisang appeals his conviction for trafficking in methamphetamines, in violation of 34 PNC § 3301. He contends that the evidence was

insufficient to support his conviction and that the trial court erred in denying his motion to compel discovery. We affirm on both issues.[1]

I. BACKGROUND

Officers of the Bureau of Public Safety ("BPS") targeted Wasisang as part of a controlled buy, an operation in which a civilian working with the police attempts to purchase drugs from a suspect. Prior to the controlled buy, officers gave a confidential informant cash that had been photocopied for identification and searched the informant and his vehicle to ensure that he had no other cash or drugs. BPS officers told the informant to purchase $100 worth of methamphetamine from Wasisang.

The informant drove to his house, followed by Officer Cedric Tatingal. From his vantage point nearby, Officer Tatingal saw Wasisang arrive at the informant's home in a white pick-up truck. The informant approached Wasisang's pick-up truck, appeared to speak with Wasisang, and then put his hand into the passenger-side window. Wasisang drove away.

After the apparent transaction, Officers Harline Stark and Byron Wong met with the informant, who gave them two yellow straws containing a substance that appeared to be methamphetamine. At trial, the informant testified that Wasisang sold him the methamphetamine. Although he testified that he was given only one straw by Wasisang, the informant later admitted he had a fuzzy memory of the controlled buy and that he might have been given two straws. When Wasisang was pulled over, Officer Tatingal

[1] Although Wasisang requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

and Detective Sergeant Temdik Ngirblekuu recovered $100 in cash with serial numbers matching those on the cash that BPS had given to the informant.

After his arrest and interrogation, Wasisang contends that he agreed to act as an informant and perform another controlled buy. According to Wasisang, Officer Stark took five "plates" of methamphetamine from the BPS evidence room and gave them to Wasisang. The controlled buy failed when the target did not show up. Wasisang moved for the Government to produce the plates, but the court denied the motion.

On the day Wasisang was arrested, Officer Stark field tested the substance inside the two straws. She then sealed the straws in a plastic bag and locked them in the evidence locker at BPS. Later, after taking the bags from the locker herself, Officer Stark went to Guam to deliver the evidence to Analyn Gatus, a drug analyst with the Forensic Science Division of the Guam Police Department ("GPD").

Gatus ran three tests to determine the nature of the substance inside the straws. The first test, a "color test," came back positive for amphetamines, a group of substances that includes methamphetamine. Gatus also performed a gas chromatograph/mass spectrometer ("GCMS") test. Methamphetamine is known to have a "retention time" of 5.65 minutes. On Gatus' first test of the substance in the straws, the retention time for the sample was 5.7 minutes, which is within the margin of error for methamphetamine. She ran a second GCMS test on a sample with a higher concentration, and the retention time was 5.66 minutes, which is consistent with methamphetamine. The GCMS test also yields a "fragmentation pattern," which creates a graph that is unique to a substance. The fragmentation pattern from both tests matched the graph for methamphetamine. Finally,

Gatus performed a Fourier transform infrared spectroscopy ("FTIR") test. The FTIR test also produced a graph, which Gatus compared to graphs of known methamphetamine. The test of the substance in the straws generated a graph consistent with that known to correspond to methamphetamine.

At Wasisang's trial, Gatus testified that in her opinion the straws contained methamphetamine. The court accepted Gatus as an expert in narcotics identification. In addition to a degree in biology from the University of Guam, Gatus had a variety of training during her time with GPD. At the time of trial, she had worked in the GPD lab for five years.

The Trial Division found Wasisang guilty of one count of Trafficking in a Controlled Substance. He was sentenced to twenty-five years' incarceration, with all save five years suspended.

On appeal, Wasisang makes two arguments. He contends (1) that the evidence was insufficient to support his conviction and (2) that the trial court erred in denying his request for the production of materials related to the five plates of methamphetamine.

II. STANDARDS OF REVIEW

In evaluating whether evidence was sufficient to sustain a criminal conviction, we "ascertain whether the conviction is clearly erroneous by viewing the evidence . . . in the light most favorable to the prosecution." *ROP v. Chisato*, 2 ROP Intrm. 227, 240 (1991). In doing so, we give due deference to the Trial Division's weighing of the evidence and credibility determinations. *Id.* If the evidence presented was sufficient for a "rational

fact-finder[]" to conclude that the appellant was guilty "beyond a reasonable doubt as to every element of the crime," we will affirm. *Id.*

We review the Trial Division's discovery rulings for abuse of discretion. *Ngiraked v. ROP*, 5 ROP Intrm. 159, 167 (1996).

III. DISCUSSION

A. The Republic presented evidence sufficient to support Wasisang's conviction.

Wasisang contends that there was insufficient evidence to sustain his conviction for trafficking methamphetamine. First, he argues that the Government did not produce evidence sufficient to show that the two straws presented during its case were given to the confidential informant by Wasisang. This prong of Wasisang's argument is framed primarily as an attack on Officer Stark's testimony and fails to acknowledge other evidence presented by the Government.

Credibility determinations are generally the province of the trial court. *Chisato*, 2 ROP Intrm. at 240. However, in extraordinary circumstances, "a credibility issue may warrant reversal of a criminal appeal." *Iyekar v. ROP*, 11 ROP 204, 206-07 (2004). This is so when a witness has been shown to be "not worthy of belief" and, thus, any evidence presented by that witness is not "reasonable evidence." *ROP v. Tmetuchl*, 1 ROP Intrm. 443, 447 (1988). However, even testimony that contains "several inconsistencies" will withstand review. *Iyekar*, 11 ROP at 207.

Wasisang points to inconsistencies in Officer Stark's testimony, including contradictory evidence regarding when she wrote her report on the interview with Wasisang, her initial report that Wasisang was arrested for trafficking marijuana, her

confusion regarding whether she photocopied or wrote down the serial numbers of the cash prior to the controlled buy, and disparities between Officer Stark's testimony and that of Officer Wong. Additionally, the confidential informant initially stated during his testimony that he received one straw from Wasisang, not two.

Although Officer Stark's testimony at times reflects confusion or haphazard police work, the inconsistencies do not render her testimony unworthy of belief. *See Iyekar*, 11 ROP at 207. Her testimony regarding the receipt of two straws from the confidential informant is corroborated by circumstantial evidence. Officer Tatingal saw Wasisang and the confidential informant reach out and exchange something. The confidential informant confirmed that the amount of money he paid to Wasisang was sufficient to purchase two straws of methamphetamine and that Wasisang may have given him two straws. Further, the full $100 was found in Wasisang's vehicle when he was arrested. Either way, whether it was one or two straws, there was sufficient evidence to show that Wasisang sold methamphetamine to the confidential informant. Thus, a "rational fact-finder" could credit Officer Stark's testimony and conclude that Wasisang gave two straws to the confidential informant. *Chisato*, 2 ROP Intrm. at 240.

asisang also argues that the Republic's evidence was insufficient to support the conclusion that the substance inside the straws was methamphetamine. In support, he points to several potential deficiencies in the testing performed at GPD, including the fact that the GPD lab has yet to be internationally accredited or otherwise validated, that Gatus did not take detailed notes regarding her tests, that Gatus testimony was not clear as to whether or when some equipment was calibrated, that Gatus ran the GCMS test

twice at different concentrations, that Gatus' testimony was not corroborated by her supervisor, and that Gatus was not an expert in drug analysis.

As to the adequacy of the procedures used at GPD, Wasisang fails to cite any authority on the appropriate procedures to be used by drug laboratories. He cites no scientific article or manual explaining the necessity of international accreditation or the importance of contemporaneous calibration. He presented no expert testimony. In the absence of contrary testimony or scientific authority, the trial court did not err in relying on Gatus' expert testimony. *Cf. Salii v. Koror State Pub. Lands Auth.*, 15 ROP 86, 87 (2008) (not clearly erroneous for trial court to rely on unrebutted expert testimony). With respect to whether Gatus took notes and whether it was appropriate for her to run the GCMS test at two different concentrations, Wasisang has similarly failed to explain how either of these facts disqualifies the tests performed or Gatus' ultimate expert opinion that the substance was methamphetamine. Wasisang also provides no citation to any case law supporting his contention that Gatus' supervisor should have testified to corroborate her testimony.

Wasisang's attack on Gatus' status as an expert also fails. He refers to Gatus as a "young lady" with too little experience to have been properly certified as an expert. Although framed as part of the sufficiency of the evidence argument, this amounts to the contention that the Trial Division erred in certifying Gatus as an expert. We review such determinations for abuse of discretion. *Cf. Tkel v. Hanpa Indus. Dev. Corp.*, 14 ROP 74, 77 (2007) (holding that evaluations of expert testimony are within the trial court's discretion); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct.

1167, 1176 (1999). It was demonstrably not an abuse of discretion for the Trial Division to certify as an expert a technician with a degree in biology, numerous drug analysis trainings, and five years' experience performing over 600 tests just like those she performed in this case. Gatus' credible expert testimony regarding the procedures used and the results obtained in this case provided a sufficient basis for the trial court to conclude that the substance in the straws was indeed methamphetamine.

Thus, we conclude that the Republic presented evidence sufficient to support the Trial Division's guilty verdict.

B. The Trial Division did not err in denying Wasisang's discovery request.

Wasisang argues that the Trial Division erred in denying his request for discovery regarding the five plates of methamphetamine that were used in the unsuccessful controlled buy. In support, Wasisang contends such discovery would show that the police were framing him or, along the same lines, that the police switched the substance he gave the confidential informant with the drugs to be used in the second controlled buy. The trial court denied his request because it concluded Wasisang was merely "trolling for information."

ROP R. Crim. P. 16(a)(1)(C) requires the government to produce papers and documents in its possession "which are material to the preparation of the defendant's defense." Our Rule 16 mirrors the United States Fed. R. Crim. P. 16, which also requires disclosure of papers and documents "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E). Given the similarities between the two rules and a lack of Palauan law on the matter, it is appropriate to use United States law to interpret the Palauan rule. *See*

Taro v. Sungino, 11 ROP 112, 114 (2004) (importing United States precedent to interpret ROP R. Civ. P. 41(b)).

"Materiality," under United States Rule 16, is demonstrated by "some indication that the pretrial disclosure of the disputed evidence would enable defendant significantly to alter the quantum of proof in his or her favor. . . . Too much should not be required in such a showing." 2 Charles Alan Wright, *Federal Practice & Procedure* § 254 (3d ed. 2000). If materials sought by a criminal defendant could reveal evidence "relevant to the development of a possible defense," a court should generally grant a defendant's discovery request. *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990) (quotation omitted). If evidence is very unlikely to yield relevant evidence, the court may in its discretion deny a defendant's discovery request. *See id.*

We are aware that a defendant will often be unable to articulate the precise relevance of documents in possession of the government, and thus a case for materiality will always be somewhat speculative. As former Chief Justice of the United States Supreme Court John Marshall asked, "if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14694). The answer, of course, is that a defendant cannot be expected to know the contents of the documents or papers he wishes to examine. Thus, only a showing of *potential* probative value is required. However, a trial court need not allow discovery of documents or papers whose materiality is

supported only by "conclusory allegations[]." *United States v. Cadet*, 727 F.2d 1453, 1466 (9th Cir. 1984).

Wasisang's theory that he was framed by the police is no more than a set of conclusory allegations. He points to no other evidence that the police engaged in a "frame-up" or switched the evidence. Because his discovery request amounted to a fishing expedition for evidence of a police conspiracy, the trial court did not abuse its discretion in denying Wasisang's motion.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division.

ARTHUR NGIRAKLSONG
Chief Justice

ALEXANDRA F. FOSTER
Associate Justice

RICHARD H. BENSON
Part-Time Associate Justice